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Nos. 85-1910 and 85-2094

SUPREME COURT, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

BUSINESS ELECTRONICS CORPORATION, PETITIONER

v.

SHARP ELECTRONICS CORPORATION

SHARP ELECTRONICS CORPORATION, CROSS-PETITIONER

v.

BUSINESS ELECTRONICS CORPORATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a supplier's decision to terminate a retailer for cutting prices is a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, only when it is the product of an agreement to maintain resale prices.

2. Whether this Court should reconsider its determination (see *Dr. Miles Medical Co.* v. *John D. Park & Sons,* 220 U.S. 373 (1911)) that resale price maintenance is per se unlawful under Section 1 of the Sherman Act.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	5
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 8
Arnold Pontiac-GMC, Inc. v. *General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986) 14
Beach v. *Viking Sewing Machine Co.*, 784 F.2d 746 (6th Cir. 1986) 9
Bender v. *Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984) 13
Borger v. *Yamaha International Corp.*, 625 F.2d 390 (2d Cir. 1980) 13
Bostick Oil Co. v. *Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), cert. denied, 464 U.S. 894 (1983) 12
Broadcast Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) ...6, 7, 12
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 7, 8
Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) . 7
Cernuto, Inc. v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) 12, 13, 14
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 11
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 3, 8, 9, 10, 11
Dr. Miles Medical Co. v. *John D. Park & Sons*, 220 U.S. 373 (1911) 7, 8
49er Chevrolet, Inc. v. *General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986) 13
Fragale & Sons Beverage Co. v. *Dill*, 760 F.2d 469 (3d Cir. 1985) 14
Garment District, Inc. v. *Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986) 12
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) 8

Cases—Continued: Page

Malley-Duff & Associates v. *Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir.), cert. denied, 469 U.S. 1072 (1984) .. 14
McCabe's Furniture, Inc. v. *La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986) 12
Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984) ..... *passim*
Morrison v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986) 13
NCAA v. *Board of Regents*, 468 U.S. 85 (1984) 6, 7
Northern Pacific Railway v. *United States*, 356 U.S. 1 (1958) 6
Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 6, 12
O.S.C. Corp. v. *Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986) 13
Schwegmann Brothers v. *Calvert Corp.*, 341 U.S. 384 (1951) 8
Seaboard Supply Co. v. *Congoleum Corp.*, 770 F.2d 367 (3d Cir. 1985) 14
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 6
324 Liquor Corp. v. *Duffy*, No. 84-2022 (Jan. 13, 1987) .. 8
Tunis Bros. v. *Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), vacated, No. 85-487 (Apr. 7, 1986) 14
United States v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920) 8
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) .. 7, 8
United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963) 11
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 7
Victorian House, Inc. v. *Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985) 12
Westman Comm'n Co. v. *Hobart International, Inc.*, 796 F.2d 1216 (10th Cir. 1986) 13
Zidell Explorations, Inc. v. *Conval International, Ltd.*, 719 F.2d 1465 (9th Cir. 1983) 12, 13, 14

Constitution and statutes:

U.S. Const. Art. II, § 3, Cl. 4 15
Sherman Act § 1, 15 U.S.C. 1 ..... 2, 3, 5, 6, 7, 13
Pub. L. No. 99-180, § 605, 99 Stat. 1169-1170 11
Pub. L. No. 99-591, § 605, 100 Stat. 3341-73 15

Miscellaneous: Page

2. P. Areeda & D. Turner, *Antitrust Law* (1978) 7
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984, 19 Weekly Comp. of Pres. Doc. 1619 (Dec. 5, 1983) 15
50 Fed. Reg. 6265-6266 (1985) 11
2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* (1986) 7

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Sharp Electronics Corporation distributes a variety of consumer and business products, including electronic calculators, to retail dealers who resell these products to end users. Sharp publishes a list of suggested minimum

retail prices for its products. Pet. App. 5a.[1]

In 1968, Business Electronics Corporation (BEC) became the exclusive retailer of Sharp calculators in the Houston, Texas area. Sharp subsequently became dissatisfied with BEC's performance. Sharp claimed that its dissatisfaction was due to BEC's failure to meet sales quotas; BEC claimed that Sharp was unhappy with BEC's policy of selling Sharp calculators at prices lower than Sharp's suggested resale prices. Pet. App. 5a.

In 1972, Sharp appointed Gilbert Hartwell as a second retail dealer in the Houston area. Although Sharp's local sales representative led Hartwell to believe that his dealership would be exclusive, Sharp's national sales manager was unwilling to terminate BEC's dealership without personally evaluating BEC's performance. Pet. App. 5a; Tr. 272, 1307-1308. BEC and Hartwell competed for approximately one year, each selling Sharp products in the Houston market. Hartwell complained both to the owner of BEC and to Sharp about BEC's discounting practices during this period.[2] In June 1973, Hartwell informed Sharp that he would terminate his dealership unless Sharp ended its relationship with BEC within 30 days. Sharp terminated BEC's dealership in July 1973. Pet. App. 6a.

2. BEC subsequently commenced this action in the United States District Court for the Southern District of Texas, asserting that Sharp's treatment of BEC violated Section 1 of the Sherman Act, 15 U.S.C. 1. The complaint alleged that Sharp had "conspired to require retail price maintenance"; that BEC "refused to abide by these requirements"; and that, as a resuit, Sharp discontinued

[1] "Pet. App." references are to the appendix to the petition in No. 85-1910.

[2] Hartwell himself did not always adhere to Sharp's schedules of suggested resale prices and testified that he was under no obligation to do so. Pet. App. 6a.

its relationship with BEC. First Amended Complaint ¶ V(b).[3]

The district court instructed the jury, over Sharp's objection, that the Sherman Act is violated " 'when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting' " (Pet. App. 6a). The jury was asked to decide, pursuant to a special interrogatory, whether " 'there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price-cutting' " (*id.* at 7a). The jury returned a verdict in BEC's favor and answered "yes" to the special interrogatory.

The district court denied Sharp's motion for judgment notwithstanding the verdict or, in the alternative, a new trial (Pet. App. 24a-34a). The court rejected Sharp's argument that the legality of its conduct under Section 1 should have been measured by the rule of reason (*id.* at 27a). It further found that "there was sufficient evidence for the jury to have concluded that Sharp and Hartwell were parties to an agreement to set product retail prices and, in furtherance of that agreement, that BEC was terminated for refusing to adhere to those prices" (*id.* at 28a-29a).[4]

3. The court of appeals reversed (Pet. App. 1a-19a). It stated that in order to invoke the per se rule against resale price maintentance "it was not enough for the jury to find that BEC was terminated to reduce price competition; the

[3] BEC also alleged that Sharp's "territorial restrictions" violated Section 1 of the Sherman Act. First Amended Complaint ¶ V(a). BEC apparently abandoned that claim following this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[4] The court also rejected Sharp's assertion that there was not sufficient evidence to support the award of damages (Pet. App. 29a-30a), its claim that the jury instructions were erroneous (*id.* at 30a-32a), and its challenges to certain evidentiary rulings (*id.* at 32a-34a).

jury should have been required to find that the termination was pursuant to a price maintenance agreement between Sharp and Hartwell" (*id.* at 7a-8a). The court of appeals observed that this Court in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), had distinguished between "concerted action to set prices and concerted action on non-price restrictions—the former is illegal *per se* while the latter is evaluated under the rule of reason" (Pet. App. 10a). It found that "the language of *Monsanto* can only indicate the [Supreme] Court's belief that a price fixing agreement is a requirement for *per se* liability in distributor-termination cases" (*id.* at 13a). The court of appeals concluded that, "in order for a manufacturer's termination of a distributor to be illegal *per se,* it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses" (*id.* at 13a-14a). Because the jury instructions "failed to reflect this standard," the court found that they were "critically defective" (*id.* at 14a (footnote omitted)).

The court of appeals went on to reject Sharp's claim that there was insufficient evidence to raise a jury issue regarding the existence of a price maintenance agreement between Sharp and Hartwell. "While it is true that there was little, if any, direct evidence that Sharp and Hartwell reached an agreement as to price," the court stated, "we think the jury reasonably could infer such an agreement from the evidence as a whole" (Pet. App. 15a). The court remanded the case for further proceedings consistent with its opinion.[5]

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[5] The court also addressed several evidentiary issues raised by Sharp (Pet. App. 15a-18a) and upheld the method of calculation of damages utilized by the district court (*id.* at 18a).

Judge Jones filed a separate concurring opinion (Pet. App. 19a-23a). She stated that "this case perfectly illustrates the arguments why vertical price restraints should be tested under antitrust's Rule of Reason rather than, as *Monsanto* continues to require, per se illegality. * * * [A]lthough *Monsanto* moves toward alleviating the threat of unwarranted treble-damage action, the abiding uncertainty suggests that the Supreme Court would more wisely jettison the precedent that led to the rule of per se illegality for vertical price restraints" (*id.* at 19a (footnote omitted)).

DISCUSSION

1. This case brings before the Court the issue that it considered most recently in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984): the proper analysis under Section 1 of the Sherman Act, 15 U.S.C. 1, of a supplier's decision to terminate a wholesaler or retailer. The Court observed in *Monsanto* that one "important distinction[] * * * at the center of * * * any * * * distributor-termination case" is the distinction "between concerted action to set prices and concerted action on nonprice restrictions" (465 U.S. at 760-761).[6] Concerted action to set prices "ha[s] been *per se* illegal since the early years of national antitrust enforcement"; nonprice restrictions, on the other hand, "are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition" (*id.* at 761).

The question presented in the petition in No. 85-1910 concerns the dividing line between these two types of vertical restraints. The jury found an agreement between a supplier and one of its retailers to terminate a second retailer because of price cutting; the jury was not instructed that in order to return a verdict for plaintiff it had

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[6] A second distinction identified by the Court in *Monsanto*—the one between concerted action and independent action—is not relevant in this case.

to find an agreement to set prices. We agree with the court of appeals that the agreement the jury found—standing alone—is not per se unlawful. The per se rule would apply only if the termination of the retailer were shown to be the product of an agreement to set resale prices. Although there has been some disagreement among the courts of appeals with respect to this question, the decisions since this Court's decision in *Monsanto* are generally in accord with the view adopted by the court below. Review by this Court of the interlocutory question presented in No. 85-1910 is therefore not warranted.[7]

a. A practice is deemed per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1, only when experience indicates that the conduct has a "pernicious effect on competition and lack[s] any redeeming virtue." *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958); see also *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979). "The decision to apply the *per se* rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output * * * or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." ' " *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985), quoting *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. at 19-20.

Price fixing among competitors is "perhaps the paradigm of an unreasonable restraint of trade." *NCAA* v. *Board of Regents*, 468 U.S. 85, 100 (1984) (footnote

[7] The court of appeals' decision permits BEC to argue on remand that Sharp's actions were per se unlawful. Conduct not per se unlawful may be unlawful under a rule of reason analysis. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). We express no view on whether BEC has preserved such a contention.

omitted); see also *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam). In the horizontal context, an agreement to eliminate price competition generally serves no procompetitive purpose: it usually reduces consumer welfare if the collaborators have market power, and it rarely serves legitimate objectives. See 2 P. Areeda & D. Turner, *Antitrust Law* § 314, at 47 (1978). Thus, per se condemnation attaches to a wide variety of price-related agreements among competitors, including agreements that only indirectly affect price. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. at 647-648 (noting the variety of horizontal arrangements condemned as per se illegal price-fixing); 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6A.02[1], at 6A-9 to 6A-13 (1986).[8]

With respect to vertical agreements, the Court has painted with a narrower brush.[9] The Court has consistently adhered to the view that resale price maintenance—a vertical agreement to set prices—constitutes a per se violation of Section 1. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102-103 (1980); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 38-45 (1960); *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373, 407 (1911). This brief does not

[8] Even in the context of horizontal price-fixing, however, this Court has cautioned that "easy labels do not always supply ready answers" (*Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. at 8). Some horizontal arrangements that have an impact on price, such as mergers and joint ventures, are neither per se violations nor unreasonable restraints (*id.* at 23). Indeed, some horizontal combinations that literally "fix prices" have been held not to be per se illegal "price-fixing" because they " 'render[ed] markets more, rather than less, competitive.' " *Id.* at 19-20, quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); see also *NCAA* v. *Board of Regents*, 468 U.S. at 107.

[9] A vertical agreement is one involving firms at different levels of the market structure. For example, an agreement between a wholesaler and a retailer is a vertical agreement.

seek to alter that rule (see pages 14-15, *infra*). Nonprice vertical restraints, on the other hand, are governed by the rule of reason. *Monsanto,* 465 U.S. at 763; *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Thus, "it is of considerable importance that * * * concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages" (*Monsanto,* 465 U.S. at 763).

This Court has applied the per se rule against resale price maintenance only to situations in which the evidence showed that the manufacturer or wholesaler "dictat[ed] the prices charged by" a wholesaler or retailer. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. at 103; see also *324 Liquor Corp.* v. *Duffy,* No. 84-2022 (Jan. 13, 1987), slip op. 5-6; *Albrecht* v. *Herald Co.,* 390 U.S. 145, 149-150 (1968); *United States* v. *Parke, Davis & Co.,* 362 U.S. at 45-46; *Schwegmann Brothers* v. *Calvert Corp.,* 341 U.S. 384, 385-386 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 212-213 (1951); *United States* v. *A. Schrader's Son, Inc.,* 252 U.S. 85 (1920); *Dr. Miles Medical Co.* v. *John D. Park & Sons,* 220 U.S. at 394. In *Monsanto,* the Court found the evidence sufficient to establish a resale price maintenance conspiracy because the evidence showed "that Monsanto and some of its distributors were parties to an 'agreement' or 'conspiracy' to *maintain resale prices* and terminate price cutters." 465 U.S. at 765 (emphasis added); see also *id.* at 764 n.9 (to show the requisite agreement, "evidence must be presented both that the distributor communicated its acquiescence or agreement [to the suggested price], and that this was sought by the manufacturer"). Under this Court's decisions, therefore, the per se rule may only be invoked upon a showing that the wholesaler or retailer has ceded to its supplier some or all control over its pricing decisions. See Pet. App. 14a.

If the Court does not distinguish between the quite different problems presented by horizontal and vertical price fixing, "there is a considerable danger that the doctrine[] enunciated in [*Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*] * * * will be seriously eroded" (*Monsanto,* 465 U.S. at 763). The Court concluded in *Sylvania* that nonprice vertical restraints should be assessed under the rule of reason because such restraints potentially "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" (433 U.S. at 54). For example, new entrants into a market may use vertical restrictions "to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer" (*id.* at 55). An established manufacturer may impose restrictions on intrabrand competition in order to encourage retailers to provide services and facilities necessary to efficient marketing of the product (*ibid.*). Such vertical restraints encourage retailers to offer such services because they eliminate the possibility of "free-riding" by retailers who do not offer such services and who, as a consequence, are able to charge lower prices. See *Monsanto,* 465 U.S. at 762-763.[10]

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[10] Services such as providing presale information and post-sale repair facilities may affect the competitiveness of a manufacturer's product. (*Sylvania,* 433 U.S. at 55). Moreover, a manufacturer may determine that its product is most competitive with other brands when these services are offered without separate charge to the consumer. In order to persuade dealers to offer such services, manufacturers must either compensate the dealers directly or otherwise enable the dealers to earn the higher gross margins necessary to defray the cost of the services. Otherwise, dealers offering "free" ancillary services will have their prices undercut by, and lose sales to, dealers who have lower costs because they offer no such services. *Ibid.*; see also *Beach* v. *Viking Sewing Machine Co.,* 784 F.2d 746, 751 n.6 (6th Cir. 1986). The prospect of "free-riding" by some dealers on the promotional and

The Court observed in *Sylvania* that vertical restraints "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers" (433 U.S. at 54). That is, many nonprice vertical restraints protect sellers from price competition. The "location clause" held subject to rule of reason scrutiny in *Sylvania,* for example, was designed to insulate a dealer from the price and nonprice competition that he would face if other dealers were free to establish new locations. Indeed, to the extent that vertical restrictions succeed in encouraging dealer efforts, and thereby strengthen a product's competitive position, they do so precisely because they allow dealers to charge prices that cover the costs of providing the extra services that the manufacturer deems necessary for the efficient distribution of the product.[11]

Accordingly, a vertical restraint cannot be per se unlawful merely because it reduces intrabrand price competition: such an effect is a characteristic of *both* resale price maintenance and nonprice restraints. Indeed, this Court observed in *Monsanto* that the "economic effect" of price and nonprice restrictions is "in many, but not all, cases similar or identical." 465 U.S. at 762; see also

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educational services of other dealers diminishes the incentives of dealers generally to offer these services in amounts necessary to ensure effective product distribution. As a result, fewer of the manufacturer's products find their way into the market—to the detriment of consumers.

[11] Vertical restrictions that lead to increased retail prices will be unprofitable for the manufacturer unless they also increase dealer sales. See *Sylvania,* 433 U.S. at 56 n.24 (citing authorities) (a manufacturer generally would prefer the lowest retail prices possible in order to increase sales and manufacturer revenues). If dealers increase their prices without providing ancillary services valued by consumers, sales would decrease as consumers turn to competing brands or decide not to purchase the product.

Sylvania, 433 U.S. at 69-70 (White, J., concurring in the judgment). Treating any reduction in price competition as justifying application of the per se rule would result in the application of the per se rule to virtually all vertical restraints, contrary to this Court's decisions in *Sylvania* and *Monsanto.* The per se rule has been restricted to those situations in which a seller has ceded to his supplier some of his authority to set prices.[12]

These general principles were properly applied by the court of appeals in this case. An agreement to eliminate a competing dealer, like other nonprice vertical restraints, may reduce intrabrand price competition.[13] Precisely for that reason, such an agreement may serve the legitimate purpose of allowing dealers to charge prices that cover the cost of services necessary to the efficient distribution of the product. Sharp contended here, for example, that BEC was free-riding on Hartwell's investment in product pro-

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[12] BEC contends (85-2094 Br. in Opp. 11-12) that the adoption by Congress of a resolution (see Pub. L. No. 99-180, § 605, 99 Stat. 1169-1170) criticizing in certain respects the Vertical Restraints Guidelines issued by the Antitrust Division of the Department of Justice (see 50 Fed. Reg. 6265-6266 (1985)) undercuts the court of appeals' conclusion regarding the scope of the per se rule. But the guidelines' definition of the per se rule is narrower than the definition adopted by the court of appeals—the guidelines state that the per se rule applies only where "there is direct or circumstantial evidence (other than effects on price) establishing an explicit agreement as to the specific prices at which goods or services would be resold" (*ibid.*). Congress criticized that narrow rule (see § 605, 99 Stat. 1169); it did not express a view regarding the somewhat broader rule adopted by the court of appeals. See generally *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963).

[13] Indeed, such an agreement is similar in this respect to the system of exclusive territories at issue in *Sylvania.* In each case, the dealer is insulated from price competition.

motion and other sales-related services. As the court of appeals concluded, a vertical agreement to restrict intrabrand price competition by eliminating a discounting dealer—without prescribing the level of the remaining dealer's resale prices—may " 'increase economic efficiency and render markets more, rather than less, competitive.' " *Northwest Wholesale Stationers, Inc.*, 472 U.S. at 295, quoting *Broadcast Music, Inc.*, 441 U.S. at 20. Such a restraint is therefore properly evaluated under the rule of reason.

b. Although the decisions of other courts of appeals rendered prior to this Court's decision in *Monsanto* appear to conflict with the decision below, the conflict has largely abated as a result of subsequent developments in those circuits. In view of the strong trend toward adoption of the rule espoused by the court below, review by this Court is not warranted at this time.

When it rendered its decision in this case, the court of appeals stated that four other circuits had adopted a conflicting rule. See Pet. App. 8a, citing *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Bostick Oil Co.* v. *Michelin Tire Corp.*, 702 F.2d 1207, 1215 (4th Cir.), cert. denied, 464 U.S. 894 (1983); *Victorian House, Inc.* v. *Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985) (post-*Monsanto* decision); *Zidell Explorations, Inc.* v. *Conval International, Ltd.*, 719 F.2d 1465 (9th Cir. 1983). The Fourth and Eighth Circuits appear to have subsequently abandoned their prior position and endorsed the rule applied by the court of appeals in the present case. See *Garment District, Inc.* v. *Belk Stores Services, Inc.*, 799 F.2d 905, 908-909 (4th Cir. 1986); *McCabe's Furniture, Inc.* v. *La-Z-Boy Chair Co.*, 798 F.2d 323, 329-330 (8th Cir. 1986).[14] Other courts of appeals have

[14] Both decisions cite and follow *Monsanto*. Neither court referred to its prior decisions.

also adopted the rule espoused by the court below. *Bender* v. *Southland Corp.*, 749 F.2d 1205, 1212 (6th Cir. 1984); *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430, 1440 (7th Cir. 1986); *Westman Comm'n Co.* v. *Hobart International, Inc.*, 796 F.2d 1216, 1223-1224 (10th Cir. 1986); see also *Borger* v. *Yamaha International Corp.*, 625 F.2d 390, 396-398 (2d Cir. 1980).

The Third and Ninth Circuits—the other circuits identified by the court of appeals and petitioner as adopting a rule different from that applied by the court below—have not had occasion to revisit the issue since this Court's decision in *Monsanto*. Like the other courts of appeals, these courts may well conclude that this Court's decision in *Monsanto* requires the modification of the rule announced in their prior decisions.[15] For that reason, we suggest that review by this Court is not warranted.

[15] The Ninth Circuit's decision in *Zidell* was cited in *O.S.C. Corp.* v. *Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986). The court in that case found the evidence insufficient to establish a per se violation principally because of the absence of proof of conspiracy (see 792 F.2d at 1467, 1468-1469); it therefore had no occasion to consider the precise scope of the per se rule. It is noteworthy that the court of appeals did support its conclusion that the per se rule did not apply by stating that "[t]here was no evidence [the manufacturer] coerced dealers on advertising or pricing decisions. The dealers admitted that [the manufacturer's] suggested retail prices were not binding" (*id.* at 1469). Indeed, in *49er Chevrolet, Inc.* v. *General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986), the Ninth Circuit, rejecting a claim by General Motors dealers that GM had engaged in per se vertical price-fixing by imposing on them prices for repairs of damaged vehicles, stated that "allegations of vertical price-fixing are generally evaluated under the 'rule of reason' " (803 F.2d at 1468).

Following this Court's decision in *Monsanto*, the Third Circuit has cited its decision in *Cernuto* for principles of law not relevant here—the standard for granting summary judgment in Section 1 cases and the test for determining whether a complaining dealer's allegations of concerted action are sufficient to defeat summary judgment; it has not applied *Cernuto* to identify the type of conduct that falls within the per

2. The question presented in the cross-petition (No. 85-2094) is whether the Court should reconsider its decisions holding that resale price maintenance is per se unlawful. We note preliminarily that the question presented in the cross-petition (like the question presented in the petition) is interlocutory: a properly instructed jury may conclude on remand that Sharp did not engage in resale price maintenance. Moreover, should the Court conclude that certiorari is not appropriate with respect to the question presented in the petition in No. 85-1910, Sharp would be in the posture of cross-petitioning from a favorable judgment on the ground that it won a less complete victory in the court of appeals than it believes to be appropriate.

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se prohibition against resale price maintenance. *Arnold Pontiac-GMC, Inc.* v. *General Motors Corp.*, 786 F.2d 564, 572-574 (3d Cir. 1986); *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 374 (3d Cir. 1985); *Tunis Bros.* v. *Ford Motor Co.*, 763 F.2d 1482, 1497-1501 (3d Cir. 1985), vacated, No. 85-487 (Apr. 7, 1986); *Fragale & Sons Beverage Co.* v. *Dill*, 760 F.2d 469, 473-474 (3d Cir. 1985); *Malley-Duff & Associates* v. *Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir.), cert. denied, 469 U.S. 1072 (1984).

Upon a close review of the *Cernuto* and *Zidell* decisions, moreover, it is by no means clear that they would present a clear conflict with the Fifth Circuit's decision in this case even if those circuits were to adhere to those decisions after *Monsanto*. The courts in both cases stated that the per se rule would not apply if a supplier were shown to have acted pursuant to a legitimate business purpose. See 595 F.2d at 170 (emphasis added) ("if defendants can demonstrate that their actions were not motivated *solely* by considerations of price then the use of a *per se* rule might be inappropriate"); 719 F.2d at 1471 (jury must be instructed to determine "whether any of the supplier's asserted motives were an actual, bona fide pursuit of a legitimate business purpose" before deciding whether to classify the conduct as illegal per se). Even in these courts' view, therefore, proof that *one* of the purposes of a vertical agreement was to reduce price competition would not be sufficient to invoke the per se rule. Indeed, the broader inquiry required under these decisions makes the analysis applied by these courts more akin to a rule of reason test than to a rule of per se illegality.

Apart from these observations, we express no view on the merits of the issue presented in the cross-petition (No. 85-2094) or on the suitability of that issue for review by this Court. The statute appropriating funds for the operation of the Department of Justice during the current fiscal year states in pertinent part that "[n]one of the funds appropriated in * * * this Act may be used for any activity to alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws" (Pub. L. No. 99-591, § 605, 100 Stat. 3341-73).[16] The President has questioned the constitutionality of this restriction upon the authority of the Executive Branch to "take Care that the Laws be faithfully executed" (Art. II, § 3, Cl. 4) as well as the wisdom of addressing important substantive issues through restrictions on government expenditures. See *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1984*, 19 Weekly Comp. of Pres. Doc. 1619 (Dec. 5, 1983). Nonetheless, to avoid raising the constitutional question here, we have decided to abide by the wishes of Congress in responding to the Court's invitation. Because our determination places off limits some of the possible answers to the Court's inquiry, and because we believe that the Solicitor General should not undertake to advise the Court on a question to which some possible answers are thus precluded, we respectfully decline to express any view on the question presented in the cross-petition.

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[16] The provision exempts from this limitation the expenditure of funds in connection with testimony before Congress.

CONCLUSION

The petition for a writ of certiorari in No. 85-1910 should be denied. We express no opinion regarding the appropriate disposition of the petition in No. 85-2094.

Respectfully submitted.

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MAY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40337